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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CARLOS C. CASTRO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, LANDMARK METAL BUILDERS, INC., Respondent Employer, SCF ARIZONA, Respondent Insurer.	2 CA-IC 2010-0010 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20082540280

Insurer No. 08-23107

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

Dee-Dee Samet, P.C.
By Dee-Dee Samet — Tucson
Attorney for Petitioner Employee

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

SCF Arizona
By James B. Stabler and Veronique Pardee — Tucson
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Employer and Insurer

E S P I N O S A, Judge.

¶1 In this statutory special action, petitioner Carlos Castro contends the administrative law judge (ALJ) erred in denying his untimely request for a hearing to contest the amount of his workers' compensation award. For the following reasons, we affirm the award.

Factual Background and Procedural History

¶2 "We view the evidence 'in the light most favorable to sustaining the findings and award of the Industrial Commission and will not set aside the award if it is based upon any reasonable interpretation of the evidence.'" *Rent A Center v. Indus. Comm'n*, 191 Ariz. 406, 407, 956 P.2d 533, 534 (App. 1998), *quoting Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 176 Ariz. 318, 324, 861 P.2d 603, 609 (1993). In September 2008, Castro sustained a work-related injury. Respondent insurer SCF Arizona (SCFA) accepted his claim for benefits and calculated his average monthly wage as $1,395.18. Although Castro had received a wage increase nearly a month before the accident, SCFA based its calculation of his average monthly wage on his earnings for the

six months preceding the injury instead of using only his wages from the thirty days preceding the accident.[1] In its notice of average monthly wage dated September 30, 2008, the Industrial Commission approved the wage determined by SCFA and reported $1,395.18 as its independently determined average monthly wage. The notice, which was sent to Castro, stated, in part:

> If you do not agree with this NOTICE and wish a hearing on the matter, your written request for hearing must be received at either office of the Industrial Commission listed below within NINETY (90) DAYS after the date of mailing of this NOTICE pursuant to A.R.S. Section 23-941 and 23-947. IF NO SUCH REQUEST FOR HEARING IS RECEIVED WITHIN THAT NINETY[-]DAY PERIOD, THIS NOTICE IS FINAL.

¶3 In March 2010, after consulting an attorney, Castro believed SCFA had erred in its monthly wage calculation, which the Industrial Commission had approved, and requested a hearing to contest it. A limited hearing was held June 3, 2010, to determine whether the ALJ had jurisdiction to consider the untimely challenge. Castro testified he has a sixth-grade education and cannot read or write. He further stated that because he had had difficulty understanding the notice, his daughter had read it to him, but she had not read the warning that he had ninety days to request a hearing. Castro testified he had believed he would receive "thirteen something" a month from SCFA and that SCFA and the Industrial Commission "knew what they were doing" and had calculated the wage correctly. He thus did not request a hearing or otherwise challenge

[1]Castro seeks to challenge this method of computing the average monthly wage because it dilutes the impact of his wage increase on the amount of his ultimate compensation. We do not address this issue, however, because it has no bearing on whether the ALJ erred in not excusing the lateness of Castro's hearing request.

the wage determination within the ninety-day period specified in the notice. In a written decision, the ALJ dismissed the hearing request, finding Castro's reliance on the Industrial Commission's determination of his average monthly wage did not excuse him from timely filing a protest or "making a reasonabl[y] diligent effort to verify the calculation of his wage." It concluded "there is no basis to excuse [Castro] from timely filing a [r]equest for [h]earing" as required by A.R.S. § 23-947.

¶4 Castro filed a request for review of that decision, asserting the Industrial Commission had not performed an independent review of the average monthly wage submitted by SCFA and his reliance on the Industrial Commission's approval of the wage calculated by SCFA constituted reasonable diligence. The ALJ affirmed her award on review, and Castro brought this statutory special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

Discussion

¶5 Castro argues his late filing should be excused for several reasons: he justifiably relied on the Industrial Commission's notice of average monthly wage, his inability to read or write constituted "incapacity" under § 23-947(B)(2), and the Industrial Commission failed to independently determine his average monthly wage, rendering the notice facially void. Because an ALJ essentially exercises a judicial function, we review its jurisdiction in the same manner as we would review the jurisdiction of a court. *See Kasalica v. Indus. Comm'n*, 65 Ariz. 28, 30-31, 173 P.2d 636, 638 (1946) (concluding same jurisdictional principles apply to Industrial Commission as to courts). Jurisdiction is ultimately a question of law we review *de novo*, but when a judge's or hearing officer's

factual findings affect her jurisdiction, we will defer to those factual determinations so long as they are supported by the record and are not intertwined with the merits of the case. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 6, 86 P.3d 944, 947 (App. 2004); *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991); *see also Asarco Inc. v. Indus. Comm'n*, 204 Ariz. 118, ¶ 7, 60 P.3d 258, 260 (App. 2003) ("In the absence of a factual dispute, we review a challenge to the finality of a Commission notice de novo.").

Justifiable Reliance

¶6 Castro first argues his untimeliness in requesting a hearing should be excused because he justifiably relied on the Industrial Commission's representation that it had independently calculated his average monthly wage and that the wage in the notice was correct. Section 23-947(B) provides in pertinent part:

> As used in this section, "filed" means that the request for a hearing is in the possession of the commission. Failure to file with the commission within the required time by a party means that the determination by the commission, insurance carrier or self-insuring employer is final and res judicata to all parties. The industrial commission or any court shall not excuse a late filing unless any of the following applies:
>
> 1. The person to whom the notice is sent does not request a hearing because of justifiable reliance on a representation by the commission, employer or carrier. In this paragraph, "justifiable reliance" means that the person to whom the notice is sent has made reasonably diligent efforts to verify the representation, regardless of whether the representation is made pursuant to statutory or other legal authority.

¶7 Castro relies on *Holler v. Industrial Commission*, 140 Ariz. 142, 680 P.2d 1203 (1984), in which our supreme court held that "[w]hen a neutral arbitrator, like the commission, certifies that an independent determination has been made, a claimant is justified in relying on the accuracy of that determination." *Id.* at 146, 680 P.2d at 1207. As SCFA points out, however, the legislature amended § 23-947(B)(1) in 1987 to adopt "reasonably diligent efforts" as the standard for determining justifiable reliance. 1987 Ariz. Sess. Laws 3rd Spec. Sess., ch. 2, § 4. In doing so, the legislature "expressly repudiated the interpretation of justifiable reliance adopted by the supreme court in its 1984 *Holler* opinion." *Borquez v. Indus. Comm'n*, 171 Ariz. 396, 398, 831 P.2d 395, 397 (App. 1991). Consequently, since its amendment in 1987, § 23-947(B)(1) "imposes an unconditional duty on claimants to make reasonably diligent efforts to verify the wage information reported," *Chavis v. Indus. Comm'n*, 180 Ariz. 424, 428, 885 P.2d 112, 116 (App. 1994), and Castro's reliance on *Holler* is misplaced.

¶8 Mere acceptance of the Industrial Commission's calculation, without more, does not constitute "reasonably diligent efforts." *Borquez*, 171 Ariz. at 397, 398, 831 P.2d at 396, 397. In *Borquez*, this court did not excuse an untimely hearing request where the claimant had a ninth-grade education and did not know how the average monthly wage was calculated. *Id.* Castro attempts to distinguish *Borquez*, claiming he cannot read or write and that the notice in this case contains a facially obvious error. We initially note that this court did not excuse the late filing in *Borquez*, even though the notice misstated the number of the claimant's dependents—an obvious error that the claimant recognized. *Id.* at 397, 831 P.2d at 396. Furthermore, Castro's inability to read

the notice is not significantly different from the *Borquez* claimant's assertion that "he had no idea how the Industrial Commission calculated his average monthly wage." *Id.* Finally, Castro failed, as did the claimant in *Borquez*, to make any effort to verify the average monthly wage within the ninety-day period specified on the notice. We therefore find Castro's attempt to distinguish *Borquez* unpersuasive. Accordingly, the ALJ did not err in determining justifiable reliance did not excuse Castro's untimely hearing request.[2]

Independent Determination

¶9 Castro also argues the average monthly wage computation was "obviously" contrary to the law and the evidence, and thus the notice is void because "the Industrial Commission rubber stamped [SCFA]'s recommendation and made no independent review." In *Mills v. Industrial Commission*, 23 Ariz. App. 28, 31, 530 P.2d 385, 388 (1975), we suggested that an average monthly wage determination may be challenged after the statutory deadline if "the Commission rubberstamped the [insurer]'s

[2]Castro's argument that his failure to timely request a hearing does not prejudice SCFA has no bearing on our decision because lack of prejudice to the insurer no longer is a factor in determining whether a late filing should be excused. Since the addition of subsection B to § 23-947, *see* 1980 Ariz. Sess. Laws, ch. 246, § 25, excusing a late filing is prohibited unless one of the statutory exceptions applies. Any judicially created excuses for late filing were "expressly repudiated" by the 1980 amendment. *Epstein v. Indus. Comm'n*, 154 Ariz. 189, 193, 741 P.2d 322, 326 (App. 1987). Consequently, the cases Castro cites recognizing judicially created excuses are inapposite. *See Van Horn v. Indus. Comm'n*, 111 Ariz. 237, 239, 527 P.2d 282, 284 (1974) (Industrial Commission could excuse late filing on estoppel theory due to employer representations); *Chavez v. Indus. Comm'n*, 111 Ariz. 364, 365-66, 529 P.2d 1181, 1182-83 (1974) (untimely filing excused if meritorious excuse, delay not excessive, and effect non-prejudicial to carrier); *Parsons v. Bekins Freight*, 108 Ariz. 130, 132, 493 P.2d 913, 915 (1972) (same); *Indus. Indem. Co. v. Indus. Comm'n*, 27 Ariz. App. 296, 298, 554 P.2d 892, 894 (1976) (late filing excused for clerical or stenographic error). Because § 23-947(B) makes no reference to prejudice to the carrier, that factor is not a proper basis for excusing Castro's late filing, and we do not consider it here.

calculations" rather than "ma[king] an independent determination as required by law." The independent-determination requirement is satisfied, however, if the Industrial Commission utilizes the wage information presented to it by the insurer, *see Harris v. Indus. Comm'n*, 24 Ariz. App. 319, 321, 538 P.2d 406, 408 (1975), and the Commission is not required to generate any documents beyond the signed notice of average monthly wage in order to establish it has performed its duty, *see Stemkowski v. Indus. Comm'n*, 27 Ariz. App. 457, 458-59, 556 P.2d 11, 12-13 (1976) ("We hold that a written order duly signed by an authorized representative of the Commission constitutes evidence of independent action by the Commission sufficient to withstand an attack . . . [on] the validity of the order as an action of the Commission.").

¶10 Here, there is no dispute the notice was signed by an authorized representative of the Industrial Commission, was based on SCFA's figures, and represented that Castro's average monthly wage had been independently determined by the Commission. The independent-determination obligation therefore was satisfied, and the notice was facially valid.[3] In considering the facts of this case, "we have been mindful of our duty to liberally construe the [Workers' Compensation] Act to effect its purpose of having industry bear its share of the burden of human injury as a cost of doing business." *Putz v. Indus. Comm'n*, 203 Ariz. 146, ¶ 24, 51 P.3d 979, 983-84 (App. 2002). "But, a 'liberal construction is not synonymous with a generous interpretation.'" *Id.*, *quoting Nicholson v. Indus. Comm'n*, 76 Ariz. 105, 109, 259 P.2d 547, 549 (1953). "The

[3]In the absence of any evidence that the Commission did not perform an independent evaluation, the ALJ, and we, must presume the Commission did so. *See Stemkowski*, 27 Ariz. App. at 458-59, 556 P.2d at 12-13.

court may 'not impose burdens and liabilities which are not within the terms or spirit' of the Act." *Id.*, *quoting Bergstresser v. Indus. Comm'n*, 13 Ariz. App. 91, 93, 474 P.2d 450, 452 (1970). Consequently, the ALJ did not err in rejecting this argument as an excuse for Castro's untimely filing.

Incapacity

¶11 Finally, Castro suggests for the first time on review that the lateness of his request should be excused because his limited education and reading ability constitutes incapacity under § 23-947(B)(2), which excuses a late filing if, "[a]t the time the notice is sent the person to whom it is sent is suffering from insanity or legal incompetence or incapacity, including minority." But, "[a]n issue not raised before the Industrial Commission either as part of the hearing process or in a request for review is not subject to appellate review." *Obersteiner v. Indus. Comm'n*, 161 Ariz. 547, 549, 779 P.2d 1286, 1288 (App. 1989); *Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977). Accordingly, because Castro did not raise this argument below, we do not consider it on review.

Disposition

¶12 For the foregoing reasons, the ALJ's decision denying Castro's untimely request for a hearing to challenge the accuracy of his compensation is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge